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Supreme Court, U.S.
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No. 03-267

In The

Supreme Court of the United States

STEPHEN M. HICKEL,

Petitioner,

v.

KENT COUNTY CONCEALED WEAPONS LICENSING BOARD,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Michigan

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does the Second Amendment to the United States Constitution give an individual an unrestricted right to carry a concealed handgun?

II. Does the Second Amendment to the United States Constitution allow a state to regulate the carrying of a concealed handgun by an individual?

III. Does the regulatory scheme of the State of Michigan conflict with any right granted to an individual under the Second Amendment?

The Petitioner has set forth a wide-ranging set of questions to bring before this Court. The essential question brought by the Petitioner, however, is whether the Second Amendment to the United States Constitution grants to the Petitioner an unrestricted right to carry a concealed handgun at any time and any place and bars or severely limits any ability of the State of Michigan to regulate concealed handguns within the State of Michigan.

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STATEMENT OF THE CASE

There is no real record upon which to base a Statement of the Case. The only transcribed hearings are September 1, 2000, when the motion hearings were adjourned, October 20, 2000, when the Circuit Court heard arguments and granted Summary Disposition to the Defendant, and November 17, 2000, when the Court entered the Order submitted by the Defendant over Plaintiff's objection. There are no transcripts of evidentiary hearings nor transcripts of depositions to point to in a statement of facts. The only sworn proofs before the lower court were the Defendant's Answers to Plaintiff's Interrogatories. The Plaintiff's five motions were all based upon the alleged facts that he set forth in his complaint or the five motions themselves. In the end, the Trial Court ruled upon standards set forth in MCR 2.116(C)(8) and found that the facts alleged by the Plaintiff failed to state a claim upon which relief can be granted.

The only record that exists is the minutes kept by the Kent County Concealed Weapons Board and correspondence contained within the Board's files. I will endeavor, however, to document the sources of the information in this Counter-Statement of Facts as best as is possible based upon the few documents that exist.

Some time in early to mid-July, 1999, Mr. Hickel filed an application for an unrestricted license to carry a concealed pistol. Mr. Hickel's reason for applying for the license was that he desired it for his personal protection. On July 21, 1999, the Caledonia Township Supervisor, William E. Johnston, preliminarily approved the application. Mr. Hickel then submitted the application to the

Kent County Sheriff's Department for further processing and review by the Board.

On August 16, 1999, the Board mailed Mr. Hickel a letter informing him that the Board had received his application. The letter also informed Mr. Hickel of the Board's policy to grant unrestricted licenses in very limited circumstances. Finally, the letter informed Mr. Hickel of the Board's upcoming September 2, 1999, meeting and suggested that he attend to present reasons for his request for an unrestricted license.

In support of his application, Mr. Hickel submitted two letters to the Board for their review. A summary of the reasons he submitted to the Board in support of the issuance of an unrestricted license is as follows:

1) As president of his own computer consulting company, Mr. Hickel earns a high income that places his children at risk for kidnapping for ransom;

2) As a computer consultant, he travels to remote locations with thousands of dollars in equipment;

3) Some of Mr. Hickel's clients are located in undesirable neighborhoods that in his opinion make his job more unsafe or questionable;

4) Mr. Hickel is also a gemologist and collects and transports diamonds and gold coins on occasion;

5) Mr. Hickel is a Captain in the United States Naval Reserve which requires him to sometimes travel at very early or late hours;

6) Mr. Hickel's status in the Civil Air Patrol requires him to be out in remote areas;

7) Mr. Hickel's membership in the Grand Rapids Amateur Radio Club, Kent County Emergency Services team, and his qualification as a Skywarn weather spotter, requires him to carry two expensive radios. Further, his membership requires him to repair or assess damaged radio equipment in unsafe weather conditions or at various times of the day; and

8) Mr. Hickel is a long distance runner and frequently runs in isolated areas early in the morning or late in the evening.

On September 2, 1999, the Board, at its regularly-scheduled monthly meeting, reviewed Mr. Hickel's application, and unanimously decided to deny Mr. Hickel's request for an unrestricted license. The Board determined that Mr. Hickel had not submitted sufficient evidence justifying his need for a concealed weapon license. A letter notifying him of the Board's decision was sent on September 10, 1999.

In response to the Board's decision, Mr. Hickel sent two additional letters, dated October 5 and 28, 1999, requesting the Board to reconsider its denial. He also listed additional information regarding his request. In his October 5, 1999, letter, Mr. Hickel informed the Board that his recent promotion to the rank of Naval Captain entailed an increased personal security risk. In his October 28, 1999, letter, Mr. Hickel questioned the Board's interpretation of MCL 28.246, and argued that the U.S. Constitution Second Amendment guaranteed the right to keep and bear arms and required a reversal of the Board's September decision.

The Board reconsidered both Mr. Hickel's reconsideration request and his letters at its November 4, 1999, meeting. At that time, the Board did not make a decision, but instead postponed it until Mr. Hickel could provide documentation from the Department of the Navy or Mr. Hickel's Commanding Officer supporting Mr. Hickel's need for a license as a result of Mr. Hickel's military service related duties. A letter was sent to Mr. Hickel requesting this information.

In response, Mr. Hickel submitted a letter to the Board, dated November 11, 1999, informing the Board that a letter from the Navy would not be appropriate. Mr. Hickel believed that the Navy should not be involved in the matter. Further, Mr. Hickel repeated his assertion that the Second Amendment's right to keep and bear arms justified an unrestricted license to be issued to him. Finally, Mr. Hickel asserted that the concealed weapons license issued to him by the State of Florida was another sufficient reason for the Board to issue him a Michigan license. However, at its December 2, 1999, meeting, the Board unanimously denied Mr. Hickel's reconsideration request. A letter informing Mr. Hickel of the Board's denial was mailed to him on December 17, 1999.

On March 2, 2000, Mr. Hickel and his attorney appeared before the Board at its meeting, and requested that the Board once again reconsider its decision that denied Mr. Hickel an unrestricted license. Mr. Hickel's attorney presented legal arguments and additional documentation in support. Mr. Hickel also informed the Board that his sister was being stalked, and that the alleged stalker had been contacting Mr. Hickel's family and asking for her whereabouts. The Board requested that Mr. Hickel and his attorney wait until the Board's April 2000 meeting so that

it could review the documentation provided. Finally, Mr. Hickel's attorney told the Board that she would provide each Board member a copy of the documentation for their review.

Due to the Attorney's failure to provide each Board member the promised documentation before the Board's April 2000 meeting, Mr. Hickel's second reconsideration request was not heard until the Board's meeting of May 4, 2000. At its meeting, the Board again denied Mr. Hickel's request for an unrestricted license, because the Board believed that Mr. Hickel had not provided sufficient information showing that Mr. Hickel feared for his person or property. Further, the Board did not believe that the constitutional right to keep and bear arms mandated the Board to issue a concealed weapon license. Instead, the Board issued Mr. Hickel a restricted license.

Mr. Hickel then filed a complaint in the Kent County Circuit Court appealing the Board's decision. He stated jurisdiction was proper under the Circuit Court's Superintending Control powers. (MCR 3.302). However, Mr. Hickel filed a number of motions for summary disposition, with supporting briefs, at various times after the filing of his appeal. The motions and briefs were filed separately. Finally, Mr. Hickel engaged in discovery by serving upon the Board a Request for Interrogatories pursuant to Michigan Court Rules. (MCR 2.309 and MCR 2.310).

A single response to all of the motions for summary disposition and a request for dismissal of the action brought by Mr. Hickel (MCR 2.116(I)(2)) was filed by the Defendant/Appellee on August 28, 2000. The Honorable George S. Buth considered all of the motions and heard oral arguments at a motion hearing on October 20, 2000.

At that hearing, Judge Buth ruled that Mr. Hickel was not entitled to summary disposition on any of the motions that he had filed and that the Defendant/Appellee was entitled to summary disposition on all counts of the complaint filed by Mr. Hickel. On October 26, 2000, an Order was submitted under the "7-Day Rule" (MCR 2.609(B)(3)). An objection to the entry of that Order was filed by Mr. Hickel on October 31, 2000. A hearing for entry of the Order submitted by the Defendant/Appellee was held on November 17, 2000. Judge Buth signed and issued the Order submitted by the Defendant/Appellee that dismissed the action filed by Mr. Hickel. The dismissal was with prejudice and without costs to all parties.

A Claim of Appeal to the Michigan Court of Appeals was filed by the Plaintiff/Appellant on November 29, 2000, and a brief was filed by the Plaintiff/Appellant on or about January 3, 2001.

Subsequent to the Kent County Circuit Court's ruling and while the appeal was pending, the Michigan Legislature amended the law dealing with County Gun Boards and the issuance of Concealed Weapons permits. The amendments were signed by Governor Engler and took effect July 1, 2001.

As a result of those amendments, many of the issues raised by the Plaintiff/Appellant were rendered moot, as he was eligible to apply for an unrestricted license as of July 1, 2001, and be granted such a license under the new standards, based upon the information contained in his prior filings with the Concealed Weapons Board. In addition, Mr. Hickel raised new issues before the Michigan Court of Appeals that were not raised – nor part of his original action – in the Kent County Circuit Court. He

raised objections to some provisions of the new amendments to the statute that did not take effect until July 1, 2001. These issues were not properly before the Michigan Court of Appeals. These are issues that were not raised at the Circuit Court and not considered by Judge Buth at the hearing on October 20, 2000. They were not part of the record before the Michigan Court of Appeals. They should have been raised in a separate action at the trial court level.

Oral arguments took place before Judge Donald S. Owens, Judge William P. Murphy, and Judge Mark J. Cavanaugh on January 21, 2003, in the Michigan Court of Appeals in Grand Rapids, Michigan. On January 31, 2003, the Court of Appeals issued a three page unpublished decision affirming the dismissal of this case by the Kent County Circuit Court. The Plaintiff/Appellant sought Leave to Appeal to the Michigan Supreme Court on February 18, 2003. The Michigan Supreme Court Denied Leave to Appeal on April 23, 2003.

The Plaintiff/Appellant has now filed a Petition for a Writ of Certiorari to the U.S. Supreme Court.

SUMMARY OF ARGUMENT

The Petitioner's principle argument is that the Second Amendment of the United States Constitution grants an individual the constitutional right to carry a concealed handgun at any time and at any place. The Petitioner takes the position that the Second Amendment to the United States Constitution grants the individual a fundamental right and does not allow individual states to

regulate the ownership and possession of concealed handguns.

In the proceedings below, the only arguments raised by the Petitioner's dealing with the federal Second Amendment right was a claim that the restrictions on concealed handguns would violate his civil rights pursuant to 42 USC § 1983. The courts below ruled, however, that the Petitioner failed to present any evidence or documentation in his Brief to support this claim under 42 USC § 1983.

The Petitioner's claim of violation of rights under the Second Amendment was not viable because the Second Amendment does not apply to the States. *Pencak v Concealed Weapons Licensing Bd for County of St. Clair*, 872 F Supp 410 (Ed Mich 1994). The Second Amendment right to bear arms applies to the right of the state to maintain a militia and not an individual's right to bear arms. *United States v Warin*, 520 F2d 103 (CA 6, 1976), *cert denied*, 426 US 448; 49 LEd2d 1185; 96 S Ct 3168 (1976).

In the following sections dealing with reasons for denying review, Respondent outlines all the responses to the arguments raised by the Petitioner in the Court below which he has now lumped into his Second Amendment argument.

REASONS FOR DENYING REVIEW

The Petition for Writ of Certiorari that is before this Court is an appeal of the Michigan Court of Appeals affirming the ruling of the Kent County Circuit Court on October 20, 2000. The Court dealt with five separate

motions having many common issues. The only practical way to respond is to outline the issues raised by the Complaint filed by the Plaintiff/Appellant on May 24, 2000. By doing so, the Respondent can deal with the myriad of issues raised in this case in some logical sequence.

A. Legal Standard for Dismissal in Trial Court

The action brought by Mr. Hickel was dismissed by the trial court under MCR 2.116(I)(2) upon argument of five motions for summary disposition brought by Mr. Hickel under MCR 2.116(C)(9) and MCR 2.116(C)(10). In doing so, the Circuit Court accepted each well-pled material allegation as true. *Johnston's Adm'r v United Airlines*, 23 Mich App 279; 178 NW2d 536 (1970); *Avery v. Arnold Home, Inc*, 17 Mich App 240; 169 NW2d 135 (1969). The Supreme Court must determine whether the Petitioner's claim as set forth in the Complaint is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery or remedy, with all properly pled facts in the complaint being accepted as true. *Burse v Wayne Co Medical Examiner*, 151 Mich App 761; 391 NW2d 479 (1986); *Woolcott v State Board of Education*, 134 Mich App 555; 351 NW2d 601 (1984); *Michigan State Employees Ass'n v Civil Service Commission*, 141 Mich App 288; 367 NW2d 850 (1985).

Mr. Hickel brought five motions for summary disposition pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). A motion for summary disposition brought under MCR 2.116(C)(9) tests the legal sufficiency of a pleaded defense. *Norgan v American Way Life Insurance*, 188 Mich App 158, 160; 469 NW2d 23 (1991). Such a motion is tested by the

pleadings alone, and all well-pled allegations are accepted as true. MCR 2.116(G)(5); *Norgan*. The motion should be granted if the defense raised is so clearly untenable as a matter of law that no development of facts could possibly deny Mr. Hickel's right to recovery. However, summary disposition is precluded when a material allegation of a complaint is categorically denied, because such a denial is a valid defense. *Nassar v Auto Club Ins Ass'n*, 435 Mich 33, 47-48; 457 NW2d 637 (1990); *Vanguard Ins Co v Clarke*, 181 Mich App 36, 42-43; 448 NW2d 754 (1989), *rev'd on other grounds*, 438 Mich 463; 475 NW2d 48 (1991). This is true even if the defense may ultimately prove unsuccessful in whole or in part. *Nassar*, 435 Mich at 48.

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of the moving party's claim. *Downey v Charlevoix Co Dept of Road Comm'rs*, 227 Mich App 621, 625-626; 576 NW2d 712 (1998). The motion must specifically identify the issue(s) as to which the moving party believes there is no genuine issue of material fact. MCR 2.116(G)(4); *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). In a MCR 2.116(C)(10) motion, the court must consider all pleadings, depositions, admissions and documentary evidence that have been already filed in the action or submitted by the parties in their motions and briefs. MCR 2.116(G)(5). The court looks at all the above documents in a light most favorable to the nonmoving party. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 397; 572 NW2d 210 (1998). To put it another way, a court should be liberal in finding a dispute. *Porter v City of Royal Oak*, 214 Mich App 478, 488; 542 NW2d 905 (1995). If the court determines that there is no genuine issue as to any material

fact, then the moving party is entitled to a judgment as a matter of law. MCR 2.116(C)(10), (G)(4). However, if a motion is completely unsupported by documentary evidence, deposition testimony, etc., the claim amounts to nothing more than sheer conjecture and argument and does not satisfy the moving party's burden for the burden to shift to the nonmoving party to come forward with its own proof to show that a genuine issue of material fact exists. *McCune v Meijer, Inc,* 156 Mich App 561, 563; 402 NW2d 6 (1986).

B. Mr. Hickel Was Incorrect in His Interpretation of MCR 2.116(C)(9): Failure To State A Valid Defense

One of the two grounds for summary disposition that Mr. Hickel pled in all five of his motions was that the Board failed to state a valid defense to his claims. MCR 2.116(C)(9). Even though he claimed all five motions were brought pursuant to MCR 2.116(C)(9), only two of his briefs addressed in detail the Board's alleged failure to state a valid defense. Those briefs are his June 19 and June 20, 2000 briefs.

On pages 35 through 37 of Mr. Hickel's June 19, 2000 brief, he addressed the affirmative defenses the Board pled in its Answer to his Complaint. He specifically disagreed with the Board's affirmative defenses and stated a counter-argument against each affirmative defense. In his June 20 brief, Mr. Hickel took issue with the Board's denials to his claim of an Open Meetings Act violation. The Board categorically denied that it violated the Open Meetings Act.

Just because Mr. Hickel disagreed with the Board's categorical denial of his Open Meetings Act claim and the

Board's affirmative defenses does not mean that the Board had failed to raise a valid defense to his claims. Pursuant to *Nassar*, *supra*, summary disposition was precluded against his Open Meetings Act claim, because the Board's categorical denials were valid defenses. The same held true for the Board's affirmative defenses. Whether or not such defenses ultimately prove successful does not matter. Therefore, summary disposition could not be granted pursuant to MCR 2.116(C)(9).

C. Mr. Hickel's Michigan Constitutional Right To Keep And Bear Arms Had Not Been Prohibited, Just Restricted

This case hinges on the correct interpretation of MCL 28.426(1). MCL 28.426(1) partly provides:

> . . . A license to carry a pistol concealed on the person or to carry a pistol, whether concealed or otherwise, in a vehicle operated or occupied by the person applying for the license, shall not be granted unless the person is 18 years of age or older, is a citizen of the United States, and has not resided in this state 6 months or more. A license shall not be issued unless it appears that the applicant has good reason to fear injury to his or her person or property, or has *other proper reasons*, and is a suitable person to be licensed.

(Emphasis added). The Board determined that Mr. Hickel did not have a "good reason to fear injury to his . . . person or property . . . ". Mr. Hickel only evidenced a fear that he was at an increased risk of harm based on his status as a military officer and on his profession as a computer consultant. Even though Mr. Hickel transported valuable gems and expensive radio equipment, he again only

presented speculation as to an increased harm, rather than an indication that he had been under some threat of harm. This was how the Board has interpreted the "good reason to fear injury" clause. The Board required some actual threat or likelihood of injury to be present, such as actual threats to one's life. Mr. Hickel simply did not present such proof. Further, the alleged stalker inquiring into Mr. Hickel's sister's location did not evidence an increased risk of harm against him, but against his sister. If an increased risk of harm against family members was sufficient to meet the "good reason to fear injury" clause, then the legislature would have written the above-statutory provision to include such.

Mr. Hickel tried to circumvent the Board's determination by claiming that he had met the "other proper reasons" clause. He has claimed that the Michigan Constitution[1] gives him the right to keep and bear arms for self-defense. According to Mr. Hickel, this right was so fundamental that the right has been reaffirmed by Michigan courts over the years. He does concede in his July 5, 2000 Brief in Support of his Motion for Summary Disposition that the State may reasonably regulate this right. However, he said that it may not do so with respect to MCL 28.426. It is his position that MCL 28.426 is designed to prevent those with criminal records from receiving a license. Since he was not a criminal, the State could not deny him an unrestricted license. By his reasoning, the right is so fundamental that it logically follows that this

[1] Mr. Hickel also claims that the Second Amendment to the U.S. Constitution also grants him a similar right, but as argued in Section I of this Brief, he does not have that right.

right will always be a "proper reason." If the Board denied him the license, then the Board had violated his civil rights by denying him a fundamental right.

There is no question that the right to keep and bear arms is not an absolute right. This right is subject to the reasonable exercise of police power. *People v McFadden*, 31 Mich App 512, 516; 188 NW2d 141 (1971). The State has a legitimate interest in limiting access to weapons peculiarly suited for criminal purposes. *Id.* However, the State may not pass a law that completely prohibits the right to keep and bear arms. *People v Swint*, 225 Mich App 353, 366; 572 NW2d 666 (1997).

The state legislature, in exercising its reasonable police power, passed a law to prohibit the carrying of a pistol in a concealed manner without a license. MCL 28.426. A Concealed Weapons Licensing Board was created to process a person's application by following minimum statutory conditions. Some of these guidelines did not provide substantial guidance for a licensing board in determining whether an applicant has a "good reason to fear injury to his or her person or property, or has *other proper reasons*, and is a suitable person to be licensed." However, each licensing board has the discretion, based upon consideration of local needs, to determine what constitutes a "good" or "proper" reason. *Hanselman v Killeen*, 419 Mich 168, 189; 351 NW2d 544 (1984).

In keeping with the state's legitimate interest in limiting access to weapons peculiarly suited for criminal purposes, the Board took the position to avoid granting unrestricted licenses. Rather, the Board exercised its discretion by granting restricted licenses as much as possible. However, by doing such, the Board did not

completely deny the constitutional right to keep and bear arms. Mr. Hickel was ultimately issued a restricted license. He could still exercise his right, but with restrictions. In the Board's determination, Mr. Hickel did not show sufficient evidence to justify an unrestricted license. His argument that the Board denied his constitutional right to keep and bear arms is erroneous. His right was not completely denied, just restricted. As the above-cited law has pointed out, such reasonable regulation and application is permissible.

It is arguable that the Legislature could have completely prohibited the carrying of a pistol in a concealed manner without infringing on the constitutional right to keep and bear arms. As the Michigan Court of Appeals pointed out in *People v Swint*, 225 Mich App 353, 363; 572 NW2d 666, a prohibition as to one type of "arm" does not completely foreclose one's constitutional right to bear other types of "arms" in defense of himself. Since "arms" can mean anything a person takes in his hands as a weapon, one still has other types of weapons that are adequately reasonable to "vindicate the right to bear arms in self-defense". *Id.* However, the Legislature chose not to pursue such a course.

Mr. Hickel's argument in support of Count I of his Complaint was not supported by any documentary evidence. Plus, he was erroneous as to the law. His right to carry a concealed weapon was not completely prohibited, just restricted. Therefore, his motion for summary disposition based on the right to keep and bear arms was denied. In fact, the Court entered judgment in favor of the Board under MCR 2.116(I)(2).

D. Mr. Hickel's "Conspiracy Against Rights" Claim Did Not Provide Him With A Civil Cause Of Action

Mr. Hickel pled in Count V of his complaint that the Board conspired to violate his civil rights by oppressing his fundamental right to keep and bear arms, in violation of 18 USC § 241. Further, he claimed that the Board had violated his right to equal protection as guaranteed by the 14th Amendment. He alleged that the Board had created two separate classes; retired law enforcement officers and ordinary citizens.

However, 18 USC § 241 is a criminal statutory provision. It does not provide a civil cause of action for damages. *Watson v Devlin*, 167 F Supp 638 (1958); *aff'd*, 268 F2d 211 (CA 6, 1959). Therefore, Mr. Hickel could not request the Court to grant him relief under Count V. The Court disposed of this count at the summary disposition hearing pursuant to MCR 2.116(I)(2).

E. The Board Did Not Abuse Its Discretion In Evaluating and Denying Mr. Hickel's Application For An Unrestricted License

As mentioned previously, the state legislature, in exercising its police power, passed a law to prohibit the carrying of a pistol in a concealed manner without a license. MCL 28.426. The legislature also provided for county licensing boards to review and determine whether to issue or deny licenses. *Id.* MCL 28.426 has been held by the Michigan Court of Appeals to reflect the state's interest in limiting public access to weapons suitable for criminal purposes. *Bay County Concealed Weapons Licensing Bd v Gasta*, 96 Mich App 784; 293 NW2d 707 (1980). This legitimate interest further confirms that the right to

keep and bear arms is subject to reasonable exercise of police power. *Id.*; *McFadden*. Such a law does not completely prohibit the right to carry and bear all types of arms. It prohibits the carrying of one type of arm, a pistol, in a concealed manner unless one has a license.

MCL 28.426 set forth minimum guidelines that a county board must follow in reviewing an application. Among some of the guidelines are: 1) that the applicant is 18 years of age or older; 2) that the applicant is a citizen of the United States; and 3) that the applicant has resided in the state of Michigan for 6 months or more. MCL 28.426(1). These guidelines are objectively clear and leave little or no room for interpretation. However, MCL 28.426(1) also requires the Board to find that the applicant has a "good reason to fear injury to his or her person or property, or has *other proper reasons*, and is a suitable person to be licensed." This guideline is subjective.

Michigan courts have interpreted the above quoted subjective provision as conferring on a county licensing board the discretionary power to determine whether the applicant meets the requirement based on local needs. *Bay County* at 789-791; *Hanselman*. The individuals who make up each county licensing board (one representative from the County Prosecutor's Office, the State Police and the County Sheriff's Department) have the relevant experience and knowledge to determine what are the community's needs. *Id.* Due to the potential danger which concealed pistols pose to the unsuspecting public, a board composed of law enforcement officials are the proper individuals to decide whether to issue a license. *Id.* Because each community will have different needs, it was only logical that some counties may be more restrictive than others when deciding whether to issue licenses.

Mr. Hickel, in his July 5, 2000 brief, argued that the Board abused its discretion by engaging in unauthorized rulemaking. Specifically, he argued that the Board unconstitutionally interpreted the "other proper reasons" clause. He claimed it engaged in a practice of statutory construction of an ambiguous term; a practice which is reserved only for the courts. He alleged that the Board had interpreted "other proper reasons" as being related and dependent on a "fear of injury to one's person or property".[2] According to Mr. Hickel, a board or administrative agency created by the legislature could not be delegated legislative power to promulgate rules or policies. Therefore, the Board's interpretation of "other proper reasons" was unconstitutional and must be reversed by the court because such an interpretation led to the discrimination against ordinary citizens in the granting of unrestricted licenses. He further claimed that two classes were created, ordinary citizens and law enforcement personnel.

Mr. Hickel further argued that even though the Board engaged in unauthorized rulemaking, it should have accepted his reason of the right to keep and bear arms as a "proper reason" under MCL 28.426. He developed this argument by alleging that the right to keep and bear arms is such a fundamental right that it would always meet the "other proper reasons" clause.

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[2] Mr. Hickel supports this alleged erroneous interpretation by the Board by reciting facts and arguments in the *Wallace B. Duffin v. Kent County Concealed Weapons Licensing Board*, 17th Judicial Circuit Court case number 96-13174-AA (1996) case. Mr. Hickel believes that facts and arguments the Board may have made in *Duffin* are proper evidence in the instant case. Mr. Hickel is mistaken in his belief.

This logic did not make sense. If the Board was not allowed to engage in rulemaking, then would it not be doing so if it were to accept his interpretation of the "other proper reasons" clause? The answer was yes. Further, his argument that a board or administrative agency may not engage in rulemaking was simply erroneous. They do so every day. They put out administrative rules to supplement statutes, even when a particular term or clause is not very clear. The Board can also do the same. As *Hanselman* and *Bay County* holds, a concealed weapons board is given the discretion to interpret "other proper reasons" based upon consideration of local needs. Mr. Hickel's unauthorized rulemaking argument simply made no sense, and served only to confuse, rather than to enlighten. Mr. Hickel did not produce any documentary evidence to support his argument. He was incorrect as to his interpretation of the law. Therefore, summary disposition based on the Board's alleged unauthorized rulemaking could not be granted.

F. The Board Did Not Violate Mr. Hickel's Right To Equal Protection Under The Law

Mr. Hickel argued that the Board's alleged interpretation of the "other proper reasons" clause as being dependent and related to a fear of injury resulted in biased decisions by the Board. He alleged that the Board had created a rule based on an interpretation that grants unrestricted licenses only to applicants who were involved in the law enforcement field, with the exception of one ordinary citizen. The Board's actions were either done with discriminatory intent or resulted in a disparate impact. The two classes that were allegedly created were law enforcement personnel, either active or retired (and

one ordinary citizen) and ordinary citizens. The only people who could ever qualify for an unrestricted license were law enforcement personnel, according to Mr. Hickel. Finally, he argued that the fundamental right allegedly violated was the right to keep and bear arms for self-defense.

To support all of these assertions, Mr. Hickel used facts and arguments made years ago in *Wallace B. Duffin v Kent County Concealed Weapons Licensing Board*, 17th Judicial Circuit Court case number 96-13174-AA (1996). He has used statistics the Board argued in the *Duffin* case and included them in his brief as being the Board's official position in this case. Moreover, for some unknown reason, he argued that MCL 28.426, when originally enacted many years ago, was written with the discriminatory intent of keeping weapons out of the hands of blacks. He claimed this original discriminatory intent was still being continued, not only against blacks, but against ordinary citizens. Further the application of the discriminatory law by the Board was encroaching upon his fundamental right to keep and bear arms. Because the law was discriminatory, in enactment and application, then a strict scrutiny analysis applied. His Equal Protection argument and analysis was quite odd and nonsensical.

The problem with Mr. Hickel's Equal Protection argument was that his fundamental right to bear and keep arms was not completely prohibited by MCL 28.426 or by the Board's interpretation of it. It was reasonably regulated. He was issued a restricted license for hunting and for business purposes. He still could exercise his right to keep and bear a concealed pistol, just not according to how he saw fit. The state had a compelling legitimate interest in reasonably regulating the right to carry a concealed

weapon. *Bay County*. MCL 28.426 has been upheld as being a reasonable regulation enacted via the state's police power. *Id.*; *McFadden*. Further, the Board did not interpret and apply MCL 28.426 in such a manner as to prohibit all persons from carrying a concealed weapon. Rather, the Board chose to issue restricted licenses. People still carried their pistols in a concealed manner, but with restrictions. Therefore, a strict scrutiny analysis, as argued by Mr. Hickel, was inapplicable. A rational basis test was proper. As argued above, MCL 28.426's enactment and application by the Board, was rationally related to a legitimate government interest. Therefore, his Equal Protection argument failed, and Counts I and II of his complaint lack merit. The Court entered judgment in favor of the Board with respect to these Counts. MCR 2.116(I)(2).

G. MCL 28.426 As Enacted, or As Applied By The Board, Did Not Violate Mr. Hickel's Right To Substantive Due Process

The heart of Mr. Hickel's substantive due process argument was that his substantive due process rights had been violated, because he believed that the Board, when interpreting "other proper reasons," completely disregarded his right to keep and bear arms as being a "proper reason." Because the right to keep and bear arms is such a fundamental right, the Board's denial failed to satisfy due process in his opinion. He further argued that the Board had created an unpublished local rule that disregarded the right to keep and bear arms, because only law enforcement related personnel were being issued unrestricted permits. According to Mr. Hickel, the Board erred in its belief that

only law enforcement related personnel warrant the "full-time right to keep and bear arms." Such an action by the Board did not serve a compelling state interest. In support of this argument, he used arguments and facts raised in the *Duffin* case, which were irrelevant, outdated and unreliable.

Aside from *Duffin*, Mr. Hickel did not bring forth any type of evidential support to support his substantive due process argument. The Board cannot come forward to show that a genuine issue as to a material fact exists. The burden is on Mr. Hickel to do so. MCR 2.116, *McCune*. Without any evidential support, the Circuit Court denied summary disposition in Mr. Hickel's favor.

H. Mr. Hickel Failed To Provide Any Documentary Evidence That The Public Rights, Under The Open Meetings Act, Had Been Violated

Mr. Hickel alleged that the Board violated the Open Meetings Act, MCL 15.261 *et seq*. Specifically, he alleged that at a 1999 meeting, applicants for concealed weapon licenses were individually called into a room to present to the Board their arguments for the issuance of a license. Then he was asked to wait outside during the Board's deliberations. Next, at the March 2000 meeting, Mr. Hickel alleged he and his attorney were asked to wait outside while the Board deliberated. Finally, Mr. Hickel claimed that he tried to make an appointment to attend the Board's May 2000 meeting, but was allegedly told by the County Clerk that he could not attend. However, he did not mention whether he actually went to the Board's May 2000 meeting and was denied entrance.

The Open Meetings Act does require that all meetings of a public body be open to the public. MCL 15.263(1). If a decision was made by a public body at a meeting that did not comply with the requirements of MCL 15.263, and if such noncompliance has impaired the public's rights under the Open Meetings Act, then a court may invalidate the decision. MCL 15.270(2).

Mr. Hickel did not present any evidence to show that the rights of the public have been impaired by the Board's actions. Nor did he show that the Board's actions were intentional or willful. *Esperance v Chesterfield Twp of Macomb Co*, 89 Mich App 456, 464; 280 NW2d 559 (1979). Mr. Hickel had to present factual allegations to support the conclusion that the rights of the public were impaired. *Jude v Heselschwerdt*, 228 Mich App 667, 672; 578 NW2d 704 (1998). He did not do so. He could not even show that his personal rights were affected since he was issued a restricted license, and he had not presented evidence that the Board denied him entrance at their May 2000 hearing.[3] Therefore, the Circuit Court could not grant summary disposition and instead entered judgment in the Board's favor with respect to Mr. Hickel's Count VIII. MCR 2.116(I)(2).

I. Mr. Hickel Failed To Present Any Evidence That The Board Violated His Civil Rights Under 42 USC § 1983

Mr. Hickel claimed that the Board violated his civil rights pursuant to 42 USC § 1983 ("Civil Rights Act"). This

[3] The Kent County Clerk is not a Board member.

section gives a remedy to someone who has been deprived of federal constitutional rights, privileges and immunities by an official's abuse of his or her position while acting under color of state law, custom or usage. *Monroe v Pape*, 365 US 167; 5 LEd2d 492; 81 S Ct 473 (1961); *overruled on other grounds by Monell v Dept of Social Services*, 436 US 658; 566 LEd2d 611; 98 S Ct 2018 (1978). He did not develop this argument or present any evidence in any of his briefs to support his claim, but still insisted it as being a "proper reason."

To begin with, Mr. Hickel's claim for the alleged violation of his Second Amendment right was not viable because the Second Amendment does not apply to the states. *Pencak v Concealed Weapons Licensing Bd for County of St. Clair*, 872 F Supp 410 (Ed Mich 1994). He cannot try to use Michigan's Constitutional right to bear and keep arms as support, because the Civil Rights Act only applies to federal constitutional rights, privileges and immunities.

Also, the Second Amendment's right to bear arms only applies to the right of the State to maintain a militia and not to an individual's right to bear arms. *United States v Warin*, 530 F2d 103, 106 (CA 6, 1976), *cert denied*, 426 US 948; 49 LEd2d 1185; 96 S Ct 3168 (1976). Put another way, an individual does not have a private right to keep and bear arms under the Second Amendment.

Therefore, the Circuit Court could not enter summary disposition in his favor because he was not entitled to relief under the Civil Rights Act. Further, the Circuit Court entered a judgment in the Board's favor with respect to Mr. Hickel's Count IV pursuant to MCR 2.116(I)(2).

J. Mr. Hickel Has Raised Several Irrelevant and Extraneous Issues

In his brief to the Court of Appeals dated January 3, 2001, and in his brief to this Court dated February 18, 2003, Mr. Hickel raised a number of irrelevant and extraneous issues. First among these issues was his inclusion of objections and challenges to the amendments to MCL 750.234(d) and other statutes which the legislature enacted and the Governor signed after the Circuit Court decided his case. These amendments did not take effect until July 1, 2001. These amendments were never at issue in the Circuit Court and were enacted after the Circuit Court made its decision. These amendments are irrelevant and extraneous to the issues before this Court.

Anything that Mr. Hickel has to say about the amendments to the statutes that took place after the date Judge Buth dismissed his case is totally irrelevant and extraneous to the appeal before this Court and should be disregarded by this Court. Mr. Hickel may seek a remedy at a later time and in a different court but it is not properly an issue before this Court. *People v 8120 Ravine Rd,* 151 Mich App 358, 390 NW2d 242 (1986); *Rochow v Spring Arbor Township*, 152 Mich App 773, 344 NW2d 102 (1986).

CONCLUSION

The sum total of what the Petitioner seeks in this matter is a complete review of the right of individual states to regulate the use, possession and carrying of concealed handguns in all situations. The ultimate goal of the Petitioner is to obtain a ruling by this Court that declares the Second Amendment to the United States Constitution grants to an individual the right to carry a concealed

handgun at any time and at any place and declares that the United States or individual states cannot regulate nor restrict that right to carry concealed handguns in any way, shape, form or manner. The vast majority of the arguments raised by the Petitioner in the Courts below were procedural arguments based upon the law of the State of Michigan. The Michigan Court of Appeals dealt with those issues and the Michigan Supreme Court declined to grant certiorari for further consideration of the state issues. In this case, the Plaintiff has now attempted to wrap all of those same arguments and address all of those arguments to this Court from a point of view that the Second Amendment grants an individual the unrestricted right to carry handguns at any time and place. As we have outlined above, the federal courts and, in particular, the United States Supreme Court, have not interpreted the Second Amendment to the United States Constitution to grant such a universal and fundamental right as the unregulated possession and use of firearms by individuals. The arguments raised by this Petitioner have been raised in the past and were settled. There is no real merit in the Court addressing this issue again.

Dated: September 16, 2003

Respectfully submitted,

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